Supreme Court, U.S.
FILED
OCT 17 1980
MICHAEL RODAK, JR., CLERK

No. 80-636

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

DIANNE MacKINNEY and GRETA GELFGREN,

Appellants,

vs.

ROSALIND GELFGREN, LARRY GELFGREN, REPUBLIC NATIONAL LIFE INSURANCE COMPANY AND ILWU-PMA WELFARE FUND,

APPELLEES.

APPEAL FROM
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JURISDICTIONAL STATEMENT

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October 15, 1980

QUESTIONS PRESENTED

1. Whether or not the Court of Appeals erred when it overruled the District Court's holding that the eligibility requirements relating to the filing of tax returns were excused as to DIANNE because to hold otherwise would mean that DIANNE could only be a beneficiary under the plan if she chose to break the law.

2. Whether or not GRETA GELFGREN was denied her due process and equal protection rights under the Fifth AMENDMENT of the UNITED STATES CONSTITUTION, when she was also denied benefits because she was not claimed as a dependent upon the decedent's income tax returns at any time prior to decedent's death.

No.

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT,

Respondent.

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IN THE
SUPREME COURT
OF THE UNITED STATES

October Term, 1980
No._____

DIANNE MacKINNEY and GRETA GELFGREN,
Appellants,

vs.

UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT,
Respondent.

APPEAL FROM THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH DISTRICT

I
INTRODUCTORY STATEMENT

Appellants, DIANNE MacKINNEY and GRETA GELFGREN, respectfully pray that this Honorable Court review the opinion and judgment of the United States Court of Appeal for the Ninth Circuit, entered

in the above-entitled case on July 21, 1980. Appellants submit this jurisdictional statement in support of their contention that the Supreme Court has jurisdiction of the appeal and that a substantial question is presented by the case of:

ROSALIND GELFGREN and LARRY GELFGREN, Plaintiff/ Appellants, vs. REPUBLIC NATIONAL LIFE INSURANCE COMPANY, et al., Defendants,	No. 78-2418 District Court No. 77-3207 (Central District)
ILWU-PMA WELFARE FUND, Cross-Complainants in Interpleader, vs. ROSALIND GELFGREN, LARRY GELFGREN, DIANNE MacKINNEY and GRETA GELFGREN, Cross-Defendants in Interpleader and Appellees as to DIANNE MacKINNEY and GRETA GELFGREN	

II
CITATION TO OPINION BELOW

The opinion of federal Magistrate HARVY A. SCHNEIDER filed April 18, 1978 from the United States District Court for the Central District of California, was not reported. Nor was the opinion of the Ninth Circuit Court of Appeals filed July 21, 1980, from which this appeal is taken. Copies of those opinions appear in the appendices hereto.

III
JURISDICTION

The instant appeal is taken from an order filed July 21, 1980, in the United States Court of Appeals for the Ninth Circuit under Case No. 78-2418. The Court of Appeals decision overruled a Federal District Court decision filed on April 18, 1978, in the Central District of California under Case No. CZ 77-3207-R(F).

The District Court found that DIANNE MacKINNEY, your appellant, hereinafter referred to as "DIANNE" was entitled to benefits payable under the terms of an

employee benefit plan entitled the ILWU-PMA WELFARE PLAN (hereinafter "the plan"). The plan is administered according to its own terms. According to the District Court Magistrate, neither DIANNE nor ROSALIND GELFGREN (hereinafter referred to as "ROSALIND") qualified under the terms of the plan. However, the district court concluded that since for DIANNE to satisfy the second requirement of the plan, she would necessarily have to have broken the law and that she, DIANNE, was excused from her failure to comply with that provision of the plan.

The Court of Appeals found that the lower erred in holding that the eligibility requirement contained in the collective bargaining plan related to income tax filings was arbitrary and unreasonable. The Court of Appeals found that the only eligible claimant to the benefits was the decedent's son by his marriage to ROSALIND, LARRY.

Jurisdiction is noted under §§ 502(a) (1) (B) and 502 (e)(1) of the Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. §§ 1132(a)(1)(B),

1132(e)(1) [1976]. Appeal is taken pursuant to 28 U.S.C. § 1254(2).

IV
QUESTIONS PRESENTED

1. Whether or not the Court of Appeals erred when it overruled the District Court's holding that the eligibility requirements relating to the filing of tax returns were excused as to DIANNE because to hold otherwise would mean that DIANNE could only be a beneficiary under the plan if she chose to break the law.

2. Whether or not GRETA GELFGREN was denied her due process and equal protection rights under the Fifth AMENDMENT of the UNITED STATES CONSTITUTION, when she was also denied benefits because she was not claimed as a dependent upon the decedent's income tax returns at any time prior to decedent's death.

V
STATEMENT OF THE CASE

This appeal is taken from an action which originated to recover benefits

payable under the terms of the collective bargaining agreement between the Pacific Maritime Association and the International Longshoremen's & Warehousemen's Union hereinafter ILWU-PMA Walfare Plan. (Hereinafter the plan).

The deceased, NILS G. GELFGREN, hereinafter referred to as "NILS," was a qualified participant in the plan on the date of his death.

The parties seeking benefits under the plan are as follows:

(a) ROSALAND GELFGREN, hereinafter referred to as "ROSALIND," the legal wife of NILS;

(b) LARRY GELFGREN, hereinafter referred to as "LARRY," NILS son;

(c) DIANNE MacKINNEY, your appellant herein, hereinafter referred to as "DIANNE," claiming by reason of her common domicile with NILS, as husband and wife; and

(d) GRETA GELFGREN, hereinafter referred to as "GRETA," the natural daughter of NILS and DIANNE.

According to the plan's own terms, the benefits will be paid to a qualified dependent or dependents, as provided hereinafter:

> "A. The woman who (a) survives the longshoreman, (b) was legally and formally married to the longshoreman for at least the one year immediately preceeding his death, and (c) who shared a common domicile with the longshoreman for at least the one year immediately preceeding the death of the longshoreman; except that in the case of the death of the longshoreman who qualified for accidental death benefits under any policy in force with the ILWU-PMA Welfare Fund trustees, the one year requirement in (b) or (c) above is eliminated; or
>
> B. If no one qualifies under A: the woman who (a) survives the longshoreman, (b) was claimed as a dependent for the three years immediately preceeding the longshoreman's death on any income tax records he may have filed, or

was a joint taxpayer with such longshoreman on his tax return, and (c) who shared a common domicile with such longshoreman for at least the three years immediately preceeding his death as both he and she were husband and wife irrespective of legal relationship between them; or (d) if no one qualifies under (a) or (b) the person, or equally to the persons who are financially dependent upon the longshoreman and who (a) were unmarried, (b) had not attained 19 years of age, (c) had been claimed as a dependent on any income tax filed by the longshoreman for the previous year if such person or persons were then alive, and (d) maintained a relationship with the longshoreman as his natural or adopted or foster child or children, irrespective of the natural or legal relationship existing between them, except that the age requirement in (b) above is eliminated in the case of person or persons otherwise qualified under this

paragraph who present or on whose behalf is presented medical evidence satisfactory to the ILWU-PMA Welfare Fund trustees that such person or persons are incapable of self-sustaining employment by reason of mental or physical handicap incurred prior to age 19."

The District Court found that ROSALIND did not satisfy A.(c) and that she had neither shared a common domicile with the decedent for at least one (1) year immediately preceeding his death nor at the time of his death. The court in addition found that NILS domicile was where NILS and DIANNE resided since 1969, as supported by the evidence presented. Since DIANNE had obviously survived NILS and furthermore shared a common domicile with NILS for more than three (3) years immediately preceeding his death, the only question remaining was whether or not DIANNE met requirement B.(b).

The District Court found that DIANNE was excused from her failure to comply with §B.(b) relating to the filing of income tax returns on the following grounds:

(a) Since DIANNE and NILS were not husband and wife, they were not permitted by law to file joint income tax returns. (26 U.S.C. §6013; California Revenue Taxation Code §18402; Alfred L. von Tersch, Jr., 47 T.C. 415 [1967]; Joseph F. Amaro [1964] §64184 P.H. Memo T.C.)

(b) Furthermore, the District Court held that DIANNE was excused from the requirement that NILS claim DIANNE as a dependent on his tax returns by virtue of Internal Revenue Code (26 U.S.C. §152) and the California Revenue Taxation Code (§17056). 26 U.S.C. §152 (b)(5) and California Revenue Taxation Code §17056(f) both provide that an individual cannot be a member of the taxpayer's household if at any time during the taxable year of the taxpayer, the relationship between such individual and the taxpayer was in violation of local law. Since, in California between the times of 1973 and August 28, 1975, it was against the law for NILS to have lived with DIANNE in the state of cohabitation, NILS was not permitted by law to claim DIANNE as a dependent. Leon Turnipseed, 27 T.C. 758; Unterman vs. Comm. of Internal Revenue, 38 T.C. 93.

Since DIANNE satisfied all the requirements of the plan except for those which the court concluded she was legally excused from satisfying, DIANNE was awarded the benefits of the plan.

In support of this contention, the District Court relied upon the United States vs. Continental F.W.D.G. Company, 311 F.Supp. 956 (U.S. Customs Court 1970).

The Court of Appeals affirmed the District Court's holding that ROSALIND failed to meet the domicile requirement in Paragraph 6A(c).

The Court of Appeals further held that the eligibility requirement contained in collective bargaining, pension or welfare plans are subject to a limited standard of review. The Court held that income tax requirements had the reasonable purpose of assuring that benefits go only to dependents. The Court stated that unmarried persons residing with longshoremen in states that did not make cohabitation illegal could have qualified as dependents. They therefore concluded that the District Court had erred in holding the requirements arbitrary and

unreasonable and found that the only eligible claimant to the benefits was LARRY GELFGREN, NILS natural child through his marriage with ROSALIND.

VI
THE QUESTIONS ARE SUBSTANTIAL

I DIANNE SHOULD NOT BE DENIED THE BENEFITS SIMPLY BECAUSE SHE COULD NOT LEGALLY COMPLY WITH THE INCOME TAX REQUIREMENT.

As pointed out by the Federal District Court on pages 10 through 14 of its April 18, 1978 opinion, DIANNE qualified for the benefits of NILS' benefit plan in all regards except for that provision which required NILS to claim DIANNE as a dependent or that DIANNE and NILS filed a joint tax return.

DIANNE and NILS were not husband and wife and therefore were not permitted by law to file joint income tax returns. (26 U.S.C. §6013; California Revenue and Taxation Code §18402; Alfred L. von Tersch,

Jr., 47 T.C. 415 [1967]; Joseph F. Amaro, [1970], §70, 208 P-H Memo T.C.; Alfred Davis, (1964), §64, 184 P-H Memo T.C.).

The District Court concluded that it would be unreasonable and arbitrary to deny DIANNE the benefits because of her non-compliance with this requirement.

The District Court further held that DIANNE could not legally comply with the alternative requirement that NILS claim DIANNE as a dependent on any tax returns he may have filed. The Court cited Internal Revenue Code (26 U.S.C. §152) and California Revenue and Taxation Code §17056. DIANNE could only have qualified as a dependent if she had her principal place of abode in the taxpayer's (NILS') home and was a member of the taxpayer's household. (26 U.S.C. §152(a)(9); Revenue and Taxation Code §17056(i)); however, an individual cannot be a member of the taxpayer's household if at any time during the taxable year, the relationship between the "dependent" and the taxpayer was in violation of the law.

In California during 1973, 1974

and 1975 (until August 28, 1975) it was against the law for NILS to have lived with DIANNE in a state of cohabitation and adultery. Penal Code §269a. Since NILS was violating the law by living with DIANNE during 1973 and 1974 and part of 1975, he was not permitted by law to claim her as a dependent. Leon Turnipseed, 27 T.C. 758; Unterman v. Commissioner of Internal Revenue, 38 T.C. 93.

The District Court excused those requirements which were illegal to satisfy citing United States v. Continental Fwdg. Company, 311 F.Supp. 956 (U.S. Customs Court 1970.)

Finally the District Court recognized that the collective bargaining agreements which embodies the requirements for benefits to be paid expressly recognizes and sanctions payment of the benefits to a person in DIANNE's position.

> "No other conclusion is warranted based on the provision of the plan that a woman is entitled to receive the benefits under the plan if she survives the long-

shoreman and if she shared a common domicile with the longshoreman for at least the three years immediately preceding his death as though he and she were husband and wife irrespective of the legal relationship between them." (District Court Opinion at page 15)

Even the Court of Appeal, in reversing the District Court's decision states:

"We think that the requirements had the reasonable purpose of assuring that benefits go only to dependents. Legal impossibility is not established simply because a particular claimant cannot meet the requirements. Unmarried persons residing with longshoremen in states that did not make co-habitation illegal could have qualified as dependents. Therefore, we conclude that the court erred in holding the requirements arbitrary and unreasonable." (Court of Appeals

Opinion at page 4). [Emphasis added].

The requirements were drafted in contemplation of persons similarly situated with DIANNE. Obviously, the requirements were not intended to deprive those unmarried persons residing with longshoremen in states such as California which made cohabitation illegal and in effect could not legally comply with the tax requirements from the benefits which were intended for them. The arbitrary and unreasonable enforcement of this requirement has deprived DIANNE of the benefits in violation of the Fifth AMENDMENT to the UNITED STATES CONSTITUTION.

II THE DENIAL OF BENEFITS TO GRETA WAS IN VIOLATION OF HER CONSTITUTIONAL RIGHTS TO EQUAL PROTECTION AND DUE PROCESS.

Should the Court find that the denial of benefits to DIANNE was proper, Appellants respectfully submit that the award of the entire $30,000.00 benefits to LARRY, (NILS' legitimate son) to the

complete exclusion of GRETA, (NILS' illegitimate daughter) was improper.

> "Visiting condemnation of irresponsible liaisons beyond bonds of marriage on head of infant is illogical and unjust and imposing disabilities on illegitimate child is contrary to basic concept that legal burdens should bear some relationship to individual responsibility or wrongdoing."
>
> Jimenez v. Weinberger, 94 S.Ct. 2496, 417 U.S. 628, 41 L.Ed. 2d 363, appeal after remand 523 F.2d 689.
>
> Weber v. Aetna Cas. & Sur. Co. 92 S.Ct. 1400, 406 U.S. 164, 31 L.Ed.2d 768.

In Trimble v. Gordon (1977) 430 U.S. 762, 52 L.Ed.2nd 31, this Court addressed the rights of legitimate vs. illegitimates to inherit from their father. The following portions of Trimble supra are applicable:

> "Despite the conclusion that classifications based upon illegiti-

macy fall 'in the realm of less than strictest scrutiny' (citing Matthews v. Lucas, 427 U.S. 495, 96 S.Ct. 2755 [1976]), Lucas also establishes that the scruting 'is not a toothless one' id., at 510, 96 S.Ct. at 2764." Trimble supra, at 1463.

The Court of Appeal's decision states that GRETA does not qualify under the plan because she was not claimed as a dependent on NILS' income tax returns, (See page 5, Court of Appeals Memorandum filed July 21, 1980). The constitutionality of the income tax requirement as it applies to GRETA, therefore "depends upon the character of the discrimination and its relation to legitimate legislative aims." Lucas, supra, at 504.

The Court of Appeal stated:

"We think that the (income tax) requirements had the reasonable purpose of assuring that the benefits go only to dependents." (See Court of Appeals Memorandum at page 4.)

Appellant respectfully submits that the discrimination which will result if GRETA is not given benefits at least equal to those given to LARRY is precisely that which Trimble and its progeny warn of.

The Court of Appeal affirmed the District Court's finding that "Nils was physically present at the place where he and Dianne lived virtually all of the time after January 1, 1969, and that Nils intended that place to be his home and that Nils' domicile was where he and Dianne resided." (Court of Appeals Memorandum footnote 2.)

GRETA was conceived from NILS' relationship with DIANNE. The three resided in the same house, GRETA was dependent upon NILS regardless of whether NILS neglected to claim her as a dependent. The purpose of the income tax requirement as stated by the Court of Appeal would be thwarted if GRETA is denied her rightful share of the benefits.

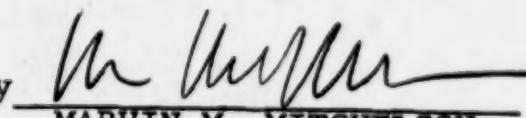
Certainly, the resulting discrimination not only outweighs the aims of the requirement, but utterly contravenes those

aims.

VII
CONCLUSION

For all of the foregoing reasons, Appellants respectfully request that this Court review the judgment of the Court of Appeal for the Ninth Circuit filed July 21, 1980, and order that judgment vacated.

Respectfully submitted,
MARVIN M. MITCHELSON,
A Professional Law Corp.

By 
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DIANNE MacKINNEY and
GRETA GELFGREN

APPENDIX "A"

F I L E D
APR 18 1978
Clerk, U.S. District Court
Central District of California
By _____ Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROSALIND GELFGREN, LARRY GELFGREN,	)	No. CV 77-3207-R(S)
Plaintiffs	)	
-vs	)	
REPUBLIC NATIONAL LIFE INSURANCE COMPANY, et al.,	)	OPINION
Defendants	)	
ILWU-PMA WELFARE FUND,	)	
Cross-Complainants in Interpleader	)	
-vs-	)	
ROSALIND GELFGREN, LARRY GELFGREN, DIANNE MacKINNEY, GRETA GELFGREN,	)	
Cross-Defendants in Interpleader	)	

This is an action to recover

benefits payable under the terms of the ILWU-PMA Welfare Plan, an employee benefit plan. The benefits have become payable due to the death of Nils G. Gelfgren (hereinafter referred to as "Nils"), who was employed as a long-shoreman within the collective bargaining unit and subject to a collective bargaining agreement between the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union for a period of more than five years prior to his death on October 16, 1975. Nils performed work for PMA member companies subject to the terms and conditions of the Pacific Coast Longshore Contract Document effective July 1, 1975 between the Pacific Maritime Association and the International Longshoremen's and Warehousemen's Union. Nils worked sufficient hours as a longshoreman to be an employee covered under the plan during the last five years of his life. He was thereby a participant in the plan on the date of his death.

The parties who seek the benefits under the plan are Rosalind Gelfgren (hereinafter referred to as "Rosalind"), the legal wife of Nils; Larry Gelfgren (hereinafter referred to as "Larry"), Nils' son;

Dianne MacKinney (hereinafter referred to as "Dianne"), who claims to be entitled to benefits by reason of her being a person with whom Nils was sharing a common domicile as though they were husband and wife; and Greta Gelfgren (hereinafter referred to as "Greta"), who Dianne claims is the natural daughter of her and Nils.

Under the plan involved in this case, benefits are paid to qualified dependents as provided in the plan. The first person who may qualify for benefits under the plan is Rosalind. She qualifies for the payment of the benefits if she satisfies all of the following requirements:

1. That she survived Nils;

2. That she was legally and formally married to Nils for at least the one year immediately preceding his death;

3. That she shared a common domicile with Nils for at least one year immediately preceding his death.[1]

---

[1]The plan also provides "that in the case of the death of the longshoreman who qualified for accidental death benefits under any policy in force with the ILWU-PMA Welfare Fund trustees, the one year requirement ... is eliminated."

There is no question that Rosalind satisfies requirements 1 and 2, supra. The critical inquiry is whether she satisfies the third requirement set forth above. The Magistrate has concluded she does not, i.e., that she neither shared a common domicile with the decedent for at least one year immediately preceding his death, nor at the time of his death.

It is too clear to question that the determination of one's domicile depends largely on his intention. Chapman v. Superior Court, 162 Cal.App.2d 421., 328 P.2d 23 (1958). Moreover, the distinction between an individual's domicile and his residence must be made. Thus, "domicile" has been defined as "the one location with which for legal purposes a person is considered to have the most settled and permanent connection; the place where he intends to remain and to which, whenever he is absent, he has the intention of returning. . . ." (Smith v. Smith, 45 Cal.2d 235, 239, 288 P.2d 497 (1955). "Residence," on the other hand, is "any factual place of abode of some permanency, more than a mere temporary sojourn." (Smith v. Smith, supra, at p. 239). In Smith the court also noted that while a per-

son can have only one domicile at a time he may have more than one physical residence separate from his domicile, and at the same time. "Domicile" has also been defined as the concurrence of physical presence accompanied by the intention to make the particular place one's permanent and indefinite home. Estate of Glassford, 114 Cal.App.2d 181, 249 P.2d 908 (1952); De Young v. De Young, 27 Cal.2d 521, 165 P.2d 457 (1946); Ryder v. Ryder, 2 Cal.App.2d 426, 37 P.2d 1069 (1934).

In the present case there exists a not insignificant amount of evidence which indicates Nils retained contact with the residence (i.e., the home) previously occupied by him and Rosalind. Thus, as Rosalind correctly points out, almost all important documents which Nils possessed bear the address of 4504 Galeano Street (Rosalind's address).[2] Among these documents were included Nils' driver's license, vehicle registration, and voter registration, as well

[2]It should be noted that some of Nils' important documents were kept by him at the residence maintained by him and Dianne. Specific reference is made to Nils' seaman's papers, his check stubs and immigration papers.

as various savings and loan accounts, credit cards, insurance documents, etc. It also seems clear Nils continued to receive all of his mail at Rosalind's home.

In addition, it must be noted Rosalind and Larry testified that Nils spent two to three nights a week at Rosalind's home after he (Nils) moved out in 1969. Simply stated, the Court does not believe this testimony. It is no doubt true Nils spent time at Rosalind's house on occasion after he moved out. It is also no doubt true Nils did some work around Rosalind's home from time to time. Additionally, there can be little doubt Nils left some of his clothes and personal belongings at Rosalind's home.

The foregoing facts notwithstanding, the Court believes that Nils' domicile is a question of fact which must be determined by the Court. Based upon the definition of "domicile" as indicated in the authorities cited above, the Court has concluded Nils was not domiciled with Rosalind on the date of his death, or for at least one year immediately preceding his death.

Although, as indicated, Nils kept Rosalind's address on his important papers, and left some personal property there, it may well be that he did this more as a matter of convenience than for any other reason. (See, e.g., Estate of Glassford, supra.) As indicated above, however, a person can have only one domicile at any one time. In this case the Court concludes that Nils was domiciled with Dianne at the time of his death, and for a number of years prior thereto. In this connection it is important to note that the court in Glassford, supra, stated that the judicial concept of "domicile" is essentially equivalent to the lay idea of "home." In a word, the Court has concluded Nils considered his home as the place where he and Dianne resided.

The Court's conclusion that Nils' domicile was where he and Dianne resided is supported by the following evidence, all of which the Court believes to be true:

1. The testimony of Tamara Quinn that Nils introduced Dianne as his wife to his (the decedent's) friends.

2. The testimony of Dianne that she and Nils began living together in 1969, and that they continued living together through two subsequent moves (to Carson and Long Beach).

3. The testimony of Dianne that when Greta was born, Nils signed Dianne into the hospital using his (Nils') surname.

4. The testimony of Dianne that after she and Nils began living together, Nils slept with her every night, except when he was out of the city.

5. The testimony of Dianne and Karen MacKinney (Dianne's daughter from a former marriage) that Nils was with Dianne every day at the residence maintained by her and Nils.

6. The testimony of Dianne that she and Nils went out socially every weekend and that, according to Rosalind's own testimony, she and the decedent never went out with other people socially after Nils moved out of her house.

7. The testimony of Dianne and Anna Romero that Nils loved Dianne and intended never to leave her.

8. The testimony of Dianne, Sandra Cochran, Anna Romero, Clyde St. Amant, Bernadette St. Amant, and Gloria Robinson that Nils' clothes were kept at the residence maintained by Dianne and Nils, and the testimony of Dianne and Clyde St. Amant that Nils' tools were kept at this residence as well.

9. The testimony of Dianne that she did Nils' washing, cooked for him, etc.

10. The testimony of Anna Romero and Gloria Robinson, each of whom saw Nils leaving the place where he and Dianne lived to go to work in the morning, and also saw him return from work in the evening.

11. The testimony of Clyde St. Amant that Nils told him that when his (Nils') son was "on his own," Nils intended to marry Dianne.

12. The testimony of Gloria Robinson that some time in 1969 Rosalind

told Mrs. Robinson that she (Rosalind) was separated from her husband, who had moved out of the house.

13. The testimony of Rosalind that when Nils was not at her house at night, she did not know where he was and did not concern herself about it; and Rosalind's further testimony that she did not know ehre Nils was living after March 1974.

Rosalind has cited In re Marriage of Baragry, 73 Cal.App.3d 448, 140 Cal.Rptr. 779 (1977) in support of her contention that Nils was domiciled with her at the time of his death. The Court believes Baragry is clearly distinguishable from the present case.

It is true certain similarities do exist between Baragry and this case. Thus, in both cases it appears that the husband moved out after a quarrel; moved in with a girl friend; maintained the mailing address of the wife; filed joint income tax returns; and used the wife's

address on his voter's registration.[3] This is, however, where the similarity between Baragry and the present case ends.

Thus, contrary to the present case, the husband in Baragry ate dinner at home almost every night for a period of time, and then three to five nights a week thereafter; took his wife and daughter on trips;[4] took his family to basketball games; took his wife on a vacation for one week and frequently took her out socially; sent his wife numerous Christmas, holiday and anniversary cards and told her he loved her on one occasion; paid all household bills and supported the family (in the present case Rosalind testified that Nils gave her only $350.00 a month for support); regularly took his laundry to his wife who washed and ironed it; and maintained the

[3]In Taff v. Goodman, 41 Cal.App.2d 771, 107 P.2d 431 (1940) the court stated that all of the formal acts to be scrutinized in ascertaining a person's domicile, the act of registering and voting is the most important, and while not necessarily conclusive, it is usually most convincing and persuasive. In the present case the Court believes the plethora of other evidence which exists far outweighs the fact that Nils used Rosalind's address on his voter registration.

[4]The only evidence remotely similar to this is that Nils and Larry went on a skiing trip on one occasion.

habits and the appearances of a married couple with his wife.

In Baragry the court concluded that since the wife was furnishing all normal wifely contributions, it would be unfair to deprive her of her share of the community property. Simply stated, there is no evidence in the record that Rosalind was performing normal wifely functions. Additionally, it should be noted that Baragry involved a determination of whether property acquired by the husband during his separation from the wife was community property. The court noted that "Property acquiring during a legal marriage is strongly presumed to be community property." (73 Cal.App.3d at p. 448) Succinctly stated, no such presumption is operative in the present case.

It must again be reiterated that domicile is a question of fact which, in the present case, involves determining Nils' intention. As indicated, the Court finds, by a preponderance of the evidence, that Nils was physically present at the place where he and Dianne lived virtually all of the time after January 1, 1969, and that

Nils intended that place to be his home, i.e., the place where he intended to remain and to which he intended to return whenever absent therefrom.

Rosalind points to the fact that, at trial, Dianne testified that Nils promised to "make things right" for her, and that this would not happen until his son, Larry, reached majority; Rosalind also points out that Dianne testified that Nils wanted to "make a home" for Larry. The Court does not believe any of this testimony is inconsistent with the conclusion that Nils' domicile was the place where he and Dianne lived. The testimony referred merely indicates that Nils was concerned for the welfare of Larry and wanted to make sure he was provided for; the testimony does not indicate that Nils felt his home was where Larry was living.

Rosalind also points out that title to the home in which Dianne and Nils were living at the time of his death was in the name of Dianne only and that Dianne and Nils shared expenses equally. The fact the home was in Dianne's name only does not derogate from the conclusion that Nils con-

sidered his home to be where he and Dianne lived. The Court believes Dianne's testimony that Nils wanted title to be placed in Dianne's name only due to the fact Nils was married. It seems clear Nils did this in order to insulate Dianne from a possible community property claim of Rosalind, which might have arisen had the property been taken in the joint names of Dianne and Nils.

The fact that expenses were to be divided equally is somewhat more troubling. It must be remembered, however, that what we are here concerened about is the place which the decedent considered to be his real home. The fact he and Dianne shared expenses, while not the arrangement one would expect in a true husband-wife situation, does not, in the Court's view, overcome the other facts present in the case which reveal Nils considered his domicile, i.e., his true home, to be where he and Dianne lived.

Finally, Rosalind points to the fact that Nils had a separate telephone address as shown by a 1972 telephone directory. Frankly, the Court does not know

quite what to make of this fact. It must be noted, however, that the record is devoid of evidence as to how much time Nils spent at that address and for what purpose. The fact of the separate address notwithstanding, the Court reaffirms it conclusion that Nils' domicile at the time of his death, and for almost seven years prior thereto, was where he and Dianne lived.

Having concluded that Rosalind does not qualify for the benefits involved in this case, it must next be determined if Dianne so qualifies. Dianne qualifies if she meets all of the following requirements:

1. That she survived Nils;

2. That she was claimed as a dependent for the three years immediately preceding Nils' death on any income tax returns he may have filed, or was a joint taxpayer with Nils on his tax returns; and

3. That she shared a common domicile with Nils for at least the three years immediately preceding his death as though he and she were husband and wife irrespective of the legal relationship between them.

There is no question Dianne meets the first requirement set forth above. Based on the discussion set forth above, the Court also concludes that Dianne satisfies the requirement of having shared a common domicile with Nils for at least the three years immediately preceding his death as though he and she were husband and wife. The critical inquiry is, therefore, whether Dianne meets the second requirement, supra.

In point of fact Dianne was not claimed as a dependent by Nils on any income tax return filed by him, nor did she and Nils file joint income tax returns. It must be observed, however, that since Nils and Dianne were not husband and wife, they were not permitted by law to file joint income tax returns. (26 U.S.C. §6013; California Revenue and Taxation Code §18402; Alfred L. von Tersch, Jr., 47 T.C. 415 (1967); Joseph F. Amaro, 1970, §70,208 P-H Memo T.C.; Alfred Davis, 1964, §64,184 P-H Memo T.C.) The Court concludes that since it would have been illegal if Nils and Dianne had attempted to comply with the joint tax return requirement of the plan, it would be unreasonable and arbitrary to

deny benefits to Dianne because of her non-compliance with this requirement. Cf. Roark v. Lewis, 401 F.2d 428 (1968). Accordingly, it is further concluded that Dianne's failure to satisfy the joint tax return requirement of the plan does not deprive her of the right to receive the benefits in question.

It must be noted, however, that the second requirement of the plan is in the disjunctive, i.e., this requirement can be satisfied if Dianne and Nils filed joint income tax returns or if Dianne was claimed as a dependent for three years immediately preceding Nils' death on any income tax returns he may have filed. It has already been indicated Dianne was not so claimed.

Dianne seeks to excuse her failure to comply with the provision of the plan which required Nils to claim her as a dependent on any income tax return filed by him on the ground that it would have been impermissible for Nils to have so claimed her. Dianne's argument is that since she earned in excess of $750.00 per year, Nils could not have claimed her as a dependent according to law. (26 U.S.C. §151; California Revenue and Taxations Code §17054)

Dianne's argument appears to miss the mark.

It has already been noted that Nils could not have filed a joint tax return with Dianne because the law did not permit him to do so, i.e., it is illegal for persons who are not husband and wife to file joint tax returns. In other words, it was legally impossible for Dianne to meet this requirement of the plan since to do so would have required her and Nils to violate the law.

By contrast, if Dianne otherwise qualified as a dependent (see discussion, infra), it was not legally impossible for Nils to have claimed her as a dependent on his tax returns. In a word, all Dianne had to do was not have a gross income for the taxable year in question in excess of $750.00 and Nils would have been able to claim her as a dependent. The fact it was impermissible for Nils to have claimed Dianne as a dependent (because she had a gross income in excess of $750.00) was not the result of a legal impossibility but, rather, was the result of Dianne's desire not to restrict her gross income to $750.00 per year. This is not the kind of situa-

tion which would justify the Court in excusing Dianne's failure to comply with the requirement that Nils claimed her as a dependent on his income tax returns.

There is, however, another reason why Dianne is excused from complying with this requirement. The Internal Revenue Code (26 U.S.C. §152) and the California Revenue and Taxation Code (§17056) lists those persons who may be properly claimed as a dependent. Under both the Internal Revenue Code and the Revenue and Taxation Code Dianne could have qualified as a dependent only if she had her principal place of abode in the home of the taxpayer and was a member of the taxpayer's household. (26 U.S.C. §152(a)(9); Revenue and Taxation Code §17056(i)) It must be noted, however, that 26 U.S.C. §152(b)(5) and Revenue and Taxation Code §17057(f) both provide that an individual cannot be a member of the taxpayer's household if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer was in violation of the law.

In California during 1973, 1974

and 1975 (until August 28, 1975) it was against the law for Nils to have lived with Dianne in a state of cohabitation and adultery. Penal Code §269a. Since Nils was violating the law by living with Dianne during 1973 and 1974 and part of 1975,[5] he was not permitted by law to claim her as a dependent. Leon Turnipseed, 27 T.C. 758; Unterman v. Commissioner of Internal Revenue, 38 T.C. 93. It appears, therefore, that it was and is just as legally impossible for Dianne to satisfy the requirement that Nils claimed her as a dependent on his tax returns, as it was and is for her to satisfy the requirement that she had filed joint tax returns with Nils. It must be concluded, therefore, that Dianne is also excused from complying with the requirement of being claimed as a dependent on Nils' tax returns, since it would again be unreasonable and arbitrary to require Dianne to satisfy a requirement that was not permitted by law. Roark v. Lewis, supra; Cf. Rehmar v. Smith, 555 F. 2d 1382 (9th Cir. 1977).

Since Dianne satisfies all of the

[5]Penal Code §269a was repealed effective August 28, 1975.

requirements of the plan, except for those which the Court has concluded she is legally excused from satisfying, it must be concluded she is entitled to the benefits at issue in this case. In reaching this conclusion the Court has effectively excised from the plan those requirements which were illegal to satisfy. The Court's decision to excise these requirements from the plan is buttressed by the decision in United States v. Continental Fwdg. Company, 311 F.Supp. 956 (U.S. Customs Court 1970) wherein the court stated:

> "Even under American law, there are no exceptions to the general rule that an agreement which violates a provision of a statute or which cannot be performed without violating a statute is illegal and void. 17 Am. Jur. 2d, Contracts §§ 165, 166, 219; 55 A.L.R. 2d 481. Where an agreement or obligation is only incidentally, indirectly or remotely connected with an illegal transaction, it will generally be enforced if it is supported by an independent consideration, so

> that plaintiff does not require the aid of the illegal transaction to make out his case. D. R. Wilder Manufacturing Co. v. Corn Products Refining Co., 236 U.S. 165, 35 S.Ct. 398, 59 L.Ed. 520 (1915); 17 Am. Jur.2d, Contracts §§ 158, 219. If any part of such an agreement is valid, it will avail pro tanto, though another part may be prohibited by statute, provided the statute does not, either expressly or by necessary implication, render the whole void, and provided the sound part can be separated from the unsound and enforced without injustice to the defendant. 17 Am.Jur.2d, Contracts §230."
> (at p. 964)

It is interesting to note that because the Court has determined Dianne is excused from complying with the requirements set forth above, the result is that the Court's decision permits Dianne to benefit from a relationship (living with Nils) which is considered sufficiently immoral (or illegal) under the tax law as

to have precluded Dianne from being named as a dependent on Nils' tax returns. It must be noted, however, that the provisions of the plan specifically contemplate that a person, such as Dianne, might receive the benefits of the plan even though the relationship maintained with the longshoreman might be considered immoral in some quarters. No other conclusion is warranted based on the provision of the plan that a woman is entitled to receive the benefits under the plan if she survives the longshoreman for at least the three years immediately preceding his death as though he and she were husband and wife irrespective of the legal relationship between them.

It is also important to observe that the provisions of the plan which permit a woman to recover benefits although she engaged in an illicit relationship with the longshoreman, is not unlawful on its face since no violation of former Penal Code §269a occurred unless one of the parties to the illicit relationship was married. People v. Breeding, 19 Cal.App. 359, 126 P. 179 (1912). Moreover, it should be mentioned that since Dianne was not married at the time she lived with Nils,

she could neither be convicted of adulterous cohabitation nor of aiding and abetting Nils' violation. Marvin v. Marvin, 18 Cal.3d 660, 660, 668, fn. 4, 134 Cal. Rptr. 815 (1976). This is not a case, therefore, where Dianne is being permitted to profit from her own wrong.

Finally, since the Court has concluded Dianne is entitled to the benefits of the plan, it necessarily follows neither Larry nor Greta is so entitled.

This Opinion shall constitute the Findings of Fact and Conclusions of Law required by Rule 52(a) of the Federal Rules of Civil Procedure.

Judgment shall be entered in accordance with this Opinion.

Dated: April 17, 1978

HARVEY A. SCHNEIDER
United States Magistrate

APPENDIX "B"

ENTERED
APR 20, 1978
Clerk, U.S. District Court
Central District of Calif.
By JN Deputy

FILED
APR 18 1978
Clerk, U.S.
District Court
Central District
of California
By Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROSALIND GELFGREN, LARRY GELFGREN, Plaintiffs -vs- REPUBLIC NATIONAL LIFE INSURANCE COMPANY, et al., Defendants	No. CV 77-3207-R(S) JUDGMENT
ILWU-PMA WELFARE FUND, Cross-Complainants in Interpleader -vs- ROSALIND GELFGREN, LARRY GELFGREN, DIANNE MacKINNEY, GRETA GELFGREN, Cross-Defendants in Interpleader	

IT IS ADJUDGED that Dianne

MacKinney be awarded the sum of Thirty Thousand Dollars ($30,000.00), being all of the benefits payable under the terms of the ILWU-PMA Welfare Plan which have become payable due to the death of Nils G. Gelfgren.

IT IS FURTHER ADJUDGED that each party shall bear his or her own costs.

Dated: April 18, 1978

HARRY A. SCHNEIDER
United States Magistrate

APPENDIX "C"

F I L E D
JUL 21 1980
RICHARD H. DEANE
Clerk, U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROSALIND GELFGREN and LARRY GELFGREN, Plaintiffs/Appellants, vs. REPUBLIC NATIONAL LIFE INSURANCE COMPANY AND ILWU-PMA WELFARE FUND, Defendants/Appellees.	No. 78-2418 MEMORANDUM
ILWU-PMA WELFARE FUND, Cross-Complainants in Interpleader, vs. ROSALIND GELFGREN, et al., Cross-Defendants in Interpleader	

Appeal from the United States District Court for the Central District of California

BEFORE: KENNEDY and FLETCHER, Circuit Judges, and HANSON,* Senior District Judge.

Plaintiffs Rosalind and Larry Gelfgren, the wife and son of decedent Nils Gelfgren, appeal from a district court decision awarding death benefits under the International Longshoremen and Warehousemen's Union-Pacific Maritime Association Welfare Plan (Plan) to Dianne MacKinney, the woman with whom Nils was living at the time of his death. Jurisdiction was noted in the district court under sections 502 (a)(1)(B) and 502(e)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1132(a)(1)(B), 1132 (e)(1)(1976). Appeal is taken pursuant to 28 U.S.C. §1291 (1976).

Nils married Rosalind in 1951, and was still married to her at the date of his accidental death in 1975. Larry was born to Nils and Rosalind on October 13, 1958. Nils apparently moved out of the house in 1969, and took up residence with

*The Honorable William C. Hanson, Senior United States District Judge for the Southern District of Iowa, sitting by designation.

Dianne. Dianne bore a daughter, Greta, by Nils.

The controversy centers around the interpretation of the portions of the Plan that state the qualifications of dependents entitled to death benefits in the event the decedent fails to designate a beneficiary.[1/] The applicable clauses are as follows:

> 6. The benefit will be paid to the qualified dependent or dependents as provided hereinafter:
>
> A. The woman who (a) survives the longshoreman, (b) was legally and formally married to the longshoreman for at least the one year immediately preceding his death, and (c) who shared a common domicile with the longshoreman for at least the one year immediately preceding his death; except that in the case of the death of the longshoreman who qualified for accidental death benefits under any policy in force with the ILWU-PMA

Welfare Fund trustees, the one-year requirement in (b) and (c) above is eliminated; . . . .

B. If no one qualifies under A: the woman who (a) survives the longshoreman, (b) was claimed as a dependent for the three years immediately preceding the longshoreman's death on any income tax records he may have filed, or was a joint taxpayer with such longshoreman on his tax return, and (c) who shared a common domicile with such longshoreman for at least the three years immediately preceding his death as both he and she were husband and wife irrespective of legal relationship between them; or (d) if no one qualifies under (a) or (b) the person, or equally to the persons who are financially dependent upon the longshoreman and who (a) were unmarried, (b) had not attained 19 years of age, (c) had been claimed as a dependent on any income tax filed by the longshoreman for the previous

year if such person or persons were then alive, and (d) maintained a relationship with the longshoreman, as his natural or adopted or foster child or children, irrespective of the natural or legal relationship existing between them . . . .

Rosalind claims the benefits under paragraph 6A of the Plan. The district court found that Nils was domiciled with Dianne for more than one year immediately preceding his death, and therefore concluded that Rosalind failed to meet the domicile requirement contained in paragraph 6A(c). The finding is not clearly erroneous and must be affirmed.2/

Rosalind argues in the alternative that the accidental death exception contained in 6A(c) is applicable and the one-year domicile requirement is thereby waived. We disagree. The one-year domicile requirement contained in clause 6A(c) is actually two requirements: (1) that the spouse be domiciled with the longshoreman for a period of one year; and (2) that the domiciliary period occur immediately

preceding death. The accidental death waiver may be interpreted to waive either the durational requirement alone, or the durational requirement and the domicile-at-death requirement. Which interpretation is correct is a crucial question for Rosalind--the waiver does her no good unless both conditions are excused.

The district court implicitly held, and we agree, that only the durational requirement was intended to be waived. The apparent purpose of the domicile condition was to foil "death-bed" marriages entered into solely to convey benefits. The accidental death waiver was designed to ameliorate the domicile requirement's harsh effect in cases where death is unanticipated and dependency continues, as in the case of newlyweds where the earning spouse dies unexpectedly. Such considerations are absent in the case before us, where the spouses were still married but long-separated. Therefore, we conclude that the accidental death waiver did not excuse the condition that Rosalind be domiciled with Nils at the time of his death.

Dianne claims the benefits under paragraph 6B. However, Dianne neither filed a joint return with Nils nor was ever claimed as a dependent on his income tax return, as required by paragraph 6B (b). To overcome this deficiency, she argues that the income tax conditions are invalid.

Challenges to eligibility requirements contained in collectively bargained pension or welfare plans are subject to a limited standard of review. A court will ascertain only whether the challenged requirements are arbitrary, capricious, or unreasonable. See Rehmar v. Smith, 555 F.2d 1362, 1371 (9th Cir. 1976); Johnson v. Botica, 537 F.2d 930 (7th Cir. 1976); Roark v. Lewis, 401 F.2d 425 (D.C. Cir. 1968). The district court held that the income tax requirement was arbitrary and capricious because California and federal law did not permit either the filing of a joint return or the claiming of Dianne as a dependent. Because it was in a sense impossible for Dianne to have met either of the requirements of clause 6B(b) consistent with the law, the district court excused Dianne from having to meet

them.

We think that the requirements had the reasonable purpose of assuring that benefits go only to dependents. Legal impossibility is not established simply because a particular claimant cannot meet the requirements. Unmarried persons residing with longshoremen in states that did not make co-habitation illegal could have qualified as dependents. Therefore, we conclude that the court erred in holding the requirements arbitrary and unreasonable.

We find the only eligible claimant to be Larry Gelfgren. When Nils died, Larry was financially dependent on Nils, was unmarried, had not attained 19 years of age, had been claimed as a dependent on Nils' income tax returns for the previous year, and had maintained a relationship with Nils as Nils' natural child, all as required by 6B(d).

Greta Gelfgren, who might otherwise also have qualified for a share of the benefits under 6B(d), was not claimed as a dependent on Nils' income tax returns

at any time prior to Nils' death.

It follows that Larry Gelfgren is the sole claimant entitled to the proceeds of the Welfare Plan. We therefore reverse the judgment of the district court and remand the case for entry of judgment in accordance with this memorandum.

FOOTNOTES

1/ Nils did not designate a beneficiary.

2/ The district court conducted over two full days of hearings in this case during which 17 witnesses testified. The main issue tried was the question of where Nils was domiciled immediately preceding his death. This is mainly a question of fact, involving most centrally the issue of Nils' intent. Carrasco-Favelo v. Immigration & Naturalization Service, 563 F.2d 1220 (5th Cir. 1977); Chapman v. Superior Court, 162 Cal.App. 2d 421, 328 P.2d 23 (1958). After listening to the witnesses and observing their demeanor, and after reviewing the rest of the evidence, the court concluded that "Nils was physically present at the place where he and Dianne lived virtually all of the time after January 1, 1969, and that Nils intended that place to be his home," and that "Nils' domicile was where he and Dianne resided."

We can reverse the district

court's finding on a question of fact only if we can say that the finding is clearly erroneous. Fed. R. Civ. P. 52. We cannot say that here.

APPENDIX "D"

United States Court of Appeals
Ninth Circuit

F I L E D
Oct 10 1980
RICHARD H. DEANE
Clerk, U.S. Court of Appeals

ROSALIND GELFGREN, et al., Plaintiffs, vs. REPUBLIC NATIONAL LIFE INSURANCE COMPANY, et al., Defendants.	NO: 78-2418 D.C. NO: 77-3207 (Central District)
ILWU-PMA WELFARE FUND, Cross-Complaintants in Interpleader, vs. ROSALIND GELFGREN, et al., Cross-Defendants in Interpleader.	NOTICE OF APPEAL

This Notice of Appeal is filed on behalf of DIANNE MacKINNEY and GRETA GELFGREN, Appellees herein. This appeal is taken to the United States Supreme Court from a Judgment by the Honorable

William C. Hanson, Senior United States District Judge for the Southern District of Iowa, sitting by designation, filed on July 21, 1980, and Justices Kennedy and Fletcher, Circuit Judges.

This appeal is taken under the provisions of 28 USC Section 1254(2).

The names of all parties to the Judgment and addresses of their respective attorneys are as follows:

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Dated: October 13, 1980

MARVIN M. MITCHELSON,
A Professional Law Corp.

By MARVIN M. MITCHELSON

Supreme Court, U. S.
FILED
NOV 17 1980
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1980

No. 80-636

DIANNE MacKINNEY and
GRETA GELFGREN,

Appellants,

vs.

ROSALIND GELFGREN, LARRY GELFGREN,
REPUBLIC NATIONAL LIFE INSURANCE COMPANY,
and ILWU-PMA WELFARE FUND,

Appellees.

MOTION TO DISMISS OR AFFIRM

EDWIN J. WILSON
and
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LONG BEACH REPORTER

TABLE OF AUTHORITIES CITED

Statutes

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California Revenue & Taxation Code 17056 4

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

DIANNE MacKINNEY and
GRETA GELFGREN,

Appellants,

vs.

UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT,

Respondent.

No. 80-636

MOTION TO DISMISS OR AFFIRM

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Appellees, ROSALIND GELFGREN and LARRY GELFGREN respectfully move to dismiss the appeal in the above entitled matter and to affirm the judgment sought to be reviewed on the following grounds:

1. The appellees move to dismiss the appeal in that the appeal is not within the jurisdiction of this court because not taken in conformity to statute. The jurisdictional

statement indicates appeal is taken pursuant to 28 U.S.C. Section 1254 (2). (page 5 Jurisdictional Statement). The said Code Section provides this honorable Court may review Court of Appeals' decisions

> "by appeal by a party relying on a State statute held by a Court of Appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, that such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;"

The jurisdictional statement appends thereto the memorandum decision of the Court of Appeals for the Ninth Circuit as Appendix C. (See pages C-1 through C-11). The Court of Appeals Decision does not invalidate any State statute. The decision merely holds the Court is limited in its review of the eligibility requirements in collective bargaining pension or welfare plan to determine "whether the challenged requirements are arbitrary, capricious, or unreasonable". (Jurisdictional Statement C-7). The Ninth Circuit Opinion reversed the District Court and held the reqiurements here in issue had a reasonable purpose and therefore are not arbitrary or unreasonable. (Jurisdictional Statement C-8).

It is therefore submitted the appeal is ill-taken and should be dismissed.

2. Appellees further move to dismiss the appeal on the ground no constitutional issue is raised. Therefore the Court should not set the case for argument.

The Jurisdictional Statement presents two claims of constitutional issues. At page 16 the claim is first made Dianne MacKinney was deprived of benefits in violation of the Fifth Amendment of the Constitution. No citation or argument is advanced in support of this conclusion. The Ninth Circuit Opinion merely concluded this particular claimant did not meet the requirements negotiated by the employers and Union. (Jurisdictional Statement C-8). There is no showing in the Jurisdictional Statement how the Fifth Amendment is involved.

The second contention in the Jurisdictional Statement is that Greta was denied her constitutional rights of equal protection and due process. The argument advanced is that Greta was discriminated against due to her illegitimacy. (Jurisdictional Statement pages 16 through 19.). No constitutional issue arises in that the decision does not turn on the legitimacy or illegitimacy of the children. The decision merely holds it is not unreasonable or arbitrary to require the decedent to have claimed a minor child on his income tax return in order for the child to be eligible for benefits. (Jurisdictional Statement C-8 and C-9).

Neither 28 U.S.C. Section 152 nor *California Revenue and Taxation Code 17056* place a legitimacy test on a claim for dependant daughter. The only requirement in each section is that the dependant daughter received over half her support from the parent claiming the daughter. Thus there is no legitimacy test involved in the present case. Therefore there is no constitutional issue of either equal protection or due process of law as to the illegitimate child, Greta. The appeal has no merit and should be dismissed.

3. Appellees move the judgment of the Ninth Circuit be affirmed in that it is manifest the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The decision of the Ninth Circuit merely reaffirms the prior decisions as to review of eligibility requirements in collective bargaining welfare plans. Applying that test the Court merely holds the requirements are not arbitrary or unreasonable.(Jurisdictional Statement pages C-7 and C-8). No new principle of law is enunciated. The Ninth Circuit merely recognizes the parties to the collective bargaining agreement established eligibility requirement to assure a true dependant of the decedent received the benefits. The Court concluded the only eligible claimant is the appellee, Larry Gelfgren. Indeed Larry Gelfgren is the only person meeting the requirements of the plan once the domicile decision was resolved adversely to the appellee,

Rosalind Gelfgren. It is therefore submitted no further argument is required and the decision of the Ninth Circuit should be affirmed.

Respectfully submitted

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and
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Attorneys for Appellees
Rosalind Gelfgren and Larry Gelfgren